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STATEMENT OF THE CASE

On July 16, 2008, Respondent-Appellant Giuseppe Gullotta was awarded temporary total disability compensation (“TTD”) by the Respondent-Appellant Industrial Commission. (Appellants’ Joint Supplement, hereinafter “Supp.” at p. 15-16). The Relator-Appellee is challenging this award but the Commission’s finding was based upon a correct analysis of the law.

The Commission had previously and correctly terminated Mr. Gullotta TTD benefits on November 29, 2007, because he refused a good-faith job offer. (Supp. at p. 4-6); *State ex rel. Ellis v. Super Valu, Inc. v. Indus. Comm.*, 115 Ohio St.3d 224, 2007-Ohio-4920, at ¶ 6 (refusal of good faith job offer is a defense to TTD benefits). At the time, Mr. Gullotta’s claim was only allowed for “sprain of lumbar region.” (Supp. at p. 4). The Commission, however, also correctly held that voluntary abandonment was inapplicable because Mr. Gullotta could not return to his former position of employment. *Id.* See *Super Valu*, 2007-Ohio-4920 (voluntary abandonment does not apply when an injured worker cannot return to her or his former position). This decision was not appealed, making it *res judicata*. As such, Mr. Gullotta remained eligible for future TTD compensation. (Supp. at p. 15-16).

Subsequent to this decision, Mr. Gullotta claim was additionally allowed for “Substantial Aggravation of Pre-Existing Hypertrophy at the L4 and L5 Facet Joints.” (Supp. at p. 7). Dr. Ungar found Mr. Gullotta had increased work restrictions, namely that Mr. Gullotta could no longer perform light-duty work. (Supp. at p. 9-12). Because of this, Mr. Gullotta applied for TTD compensation. To consider Mr. Gullotta’s request, the Commission first had to find it had continuing jurisdiction pursuant to R.C. 4123.52 since it earlier denied Mr. Gullotta’s TTD application pursuant to the defense of the refusal of a good faith job offer. The Commission

correctly determined that ‘new and changed circumstances’ existed, namely that Mr. Gullotta had an additional condition and increased work restrictions that provided the Commission continuing jurisdiction. See *State ex rel. Bing v. Indus. Comm.* (1991), 61 Ohio St.3d 424, 426, 575 N.E.2d 177 (a change in a claimant’s allowed conditions warrants continuing jurisdiction). The Commission subsequently found that Mr. Gullotta was entitled to TTD because he could not return to his former position of employment. *State ex rel. Consolidation Coal Co. v. Indus. Comm.* (1979), 58 Ohio St.2d 127. The defense of refusal of a good faith job offer no longer applied because the employer did not make a new job offer following Mr. Gullotta’s additional allowance that fit his increased work restrictions. O.A.C. § 4121-3-32(B)(1)(b) (job offer must take into account all allowed conditions). The employer’s previous offer was made when Mr. Gullotta’s claim was only allowed for “sprain lumbar region.” Considering the new allowance, Dr. Ungar found he could no longer perform the offered light-duty position with his work restrictions. (Supp. at p. 11). The Commission is the fact finder regarding whether an injured worker can undertake a purported job offer and the Commission here found Mr. Gullotta TTD. *Super Valu*, 2007-Ohio-4920, ¶13.

This analysis was correct under applicable precedent and entitled to deference. The Commission is the exclusive evaluator of the weight and credibility of the evidence. *State ex rel. LTV Steel Co. v. Indus. Comm.* (2000), 88 Ohio St.3d 284. It is the Commission’s prerogative to interpret evidence and draw reasonable inferences from that evidence. *State ex rel. West v. Indus. Comm.* (1996), 74 Ohio St.3d 354, 356, 658 N.E.2d 780; *State ex rel. King v. Trimble* (1996), 77 Ohio St.3d 58, 63, 671 N.E.2d 19. The Commission is given deference in interpreting R.C. 4123.52, because it is the agency that has accumulated substantial expertise and to which the legislature has delegated the responsibility of implementing the legislative command. *State*

ex rel. McLean v. Indus. Comm of Ohio et al. (1986) 25 Ohio St. 2d 90, 93, 495 N.E.2d 370. The Commission determines whether continuing jurisdiction exists. *Bing*, 61 Ohio St.3d at 426. Once the Commission makes such a decision, its decision is only subject to mandamus abuse of discretion review. So long as some evidence supports the Commission's decision, it will be upheld. *State ex rel. Fiber-Lite Corp. v. Industrial Com. of Ohio* (1988), 36 Ohio St.3d 202, 204, 522 N.E.2d 548.

Unfortunately, the Tenth District did not feign deference to either the Commission's legal interpretation or factual findings. Instead, the Appellate Court confused the distinct doctrines of voluntary abandonment, defense of a good faith job offer, and continuing jurisdiction. (Appellate Court Decision, Appendix A, at ¶ 4). See *Super Valu*, 2007-Ohio-4920, ¶13 (the defenses of voluntary abandonment and good faith job offer refusal are separate doctrines). In so doing, the Tenth District created a novel theory—that a lack of evidence demonstrating that Mr. Gullotta could no longer perform 'light duty work' made the new and changed circumstances doctrine inapplicable. (Appellate Court Decision, Appendix A, at ¶ 4). But the Appellate Court failed to cite any case law to support this theory—and for good reason—the Tenth District created this rule out of thin air. (Id.)

The decision is simply incorrect as a matter of law. The Tenth District essentially inserted the defense of disproving the refusal of a good faith job offer as a means to deny continuing jurisdiction. (Id.) But this simply improperly applies the law. The Commission has always had continuing jurisdiction when an injured worker's condition changes. *Bing*, 61 Ohio St.3d at 426. And this Honorable Court refuses to place additional barriers to finding continuing jurisdiction and TTD for an injured worker. Id. The Appellate Court gave no deference to the Commission's determination that continuing jurisdiction exists, going so far as to ignore the

Commission's fact findings. (Appellate Court Decision, Appendix A, at ¶ 6 (Court gives no deference to the Commission's finding regarding Dr. Ungar's increased restrictions and makes its own findings that ignore Dr. Ungar's plain language). But this is simply judicial activism and not the proper posture in mandamus review.

The Commission correctly applied the applicable law. First, voluntary abandonment was inapplicable so the Commission could find continuing jurisdiction. Second, the Commission found continuing jurisdiction because Mr. Gullotta's claim now had an additional allowance and he was under new work restrictions. This is the Commission's decision to make—not the Tenth District's. *Bing*, 61 Ohio St.3d at 426. Finally, the Commission found the defense of a good faith job offer was no longer applicable because Mr. Gullotta had additional conditions and restrictions that made the employer's previous job offer no longer sufficient. The Commission's decision is entitled to deference in the employer's mandamus challenge. When the proper legal standards are applied, it is clear that mandamus is not appropriate.

STATEMENT OF FACTS

On January 2, 2007, Giuseppe Gullotta injured his lower back while employed by Relator-Appellee. His claim was originally allowed for "Sprain Lumbar Region," and Mr. Gullotta was placed on salary continuation by the employer. (Supp. at p. 4). Mr. Gullotta eventually returned to light duty work based upon restrictions provided by his then physician of record, Dr. Lohr. (Id.)

APV offered Mr. Gullotta work within his then light-duty restrictions. Unfortunately, Mr. Gullotta found the new duties increased his low back pain and he left the light duty position. (Supp. at p. 4-6). On August 1, 2007, Mr. Gullotta submitted two C-84s completed by Daniel

Mazanec, M.D., requesting TTD compensation for the period from April 24 through November 4, 2007. (Id.)

The Industrial Commission denied Mr. Gullotta's request for TTD, pursuant to R.C. 4123.56(A), because Mr. Gullotta left a light-duty job with APV that was within his physician's restrictions. (Supp. at p. 5). This decision was based on the Commission's finding that Mr. Gullotta could perform the employment in question, given that at the time his condition was only allowed for "sprain lumbar region." (Id.) However, in that same order, the Commission made clear that Mr. Gullotta's refusal of a light duty job offer did not equate to a voluntary abandonment of employment, because it was undisputed that Mr. Gullotta could not return to his former position. (Id.) Pursuant to *State ex rel. Ellis v. Super Valu, Inc. v. Indus. Comm.*, 115 Ohio St.3d 224, 2007-Ohio-4920, at ¶ 6, and *OmniSource Corp. v. Indus. Comm.* (2007), 113 Ohio St.3d 303, voluntary abandonment was inapplicable because the prerequisite was not met, namely that Mr. Gullotta could not return to his former employment position. (Id.) As such, the Commission's TTD denial did not bar the receipt of future temporary total disability compensation. (Supp. at p. 15-16). The employer did not appeal the order, making the decision *res judicata*.

On March 24, 2008 Mr. Gullotta's claim was additionally allowed for "Substantial Aggravation of Pre-Existing Hypertrophy at the L4 and L5 Facet Joints." (Supp. at p. 7). Due to the new claim allowances, Mr. Gullotta's physician of record, Dr. Ungar, found Mr. Gullotta had additional workplace restrictions. On September 11, 2007, Dr. Ungar found that Mr. Gullotta was temporarily and totally disabled from work. (Supp. at p. 9-10). On June 4, 2008, Dr. Ungar added that

It is my opinion and has been my opinion since the time of the treatment of Mr. Gullotta of 9/11/07 that he was temporary total disability from the onset of the time of 11/5/07 through 5/16/08. It clearly indicates in my records that he was unable to return to that employment therefore I believe the previous job or any form of light duty modification. He was doing light duty at that time and the light duty has proven to cause continued aggravation of his symptomatology on a daily basis.

(Supp. at p. 11). As a result of the new allowances and the additional work restrictions, Respondent filed a new motion for temporary total disability benefits. The Commission subsequently granted Mr. Gullotta's request for TTD. (Supp. at p. 15-16).

The Staff Hearing Officer ("SHO") began by analyzing the previous decision denying Mr. Gullotta TTD. The Commission found that Mr. Gullotta was denied TTD in the earlier order because Mr. Gullotta was found to have quit his light duty job. (Id.) But the SHO further noted that "the Staff Hearing Officer [in the previous decision] expressly found the Injured Worker's resignation from employment on 04/23/2007 did not amount to voluntary abandonment of employment as the injured worker was unable to return to his former position of employment on the date he resigned." (Id.) The SHO found that Mr. Gullotta's previous TTD denial was not a bar to a future award. (Id.)

The SHO then found that continuing jurisdiction under R.C. 4123.52 was appropriate because "new and changed circumstances" existed. The SHO found that:

Subsequent to this determination, this claim was additionally recognized for substantial aggravation of hypertrophy of the L4 and L5 facet joints on worsening of the Injured Worker's condition and is evidence of new and changed circumstances which warrant the payment of temporary total compensation.

(Id.) Once the SHO found it had continuing jurisdiction to consider Mr. Gullotta's application, the SHO found ample evidence to support Mr. Gullotta's application for TTD benefits.

This decision is based on the treatment records, narrative reports dated 10/04/2007 and 06/04/2008, and C-84 report dated 04/14/2008 from B.A. Ungar, D.C, and on the treatment records from Dr. Neunedorf which reflect the Injured Worker is presently receiving facet blocks from the newly recognized conditions. The Staff Hearing Officer notes the Medco-14 dated capabilities which were more restrictive than those issued by Dr. Lohr and Dr. Mazanec which were the focus of the prior temporary total disability determination. Further, the newly imposed restrictions from Chiropractor Ungar on the 04/14/2008 C-84 report include the newly recognized condition of substantial aggravation of hypertrophy of the L4 and L5 facet joints. Lastly, the Staff Hearing Officer notes that the file presently contains no medical evidence which indicates the Injured Worker is capable of returning to his former position of employment in the shipping department of the named employer.

(Id.) Finally, the SHO critically held that an Injured Worker's ability to undergo light duty work has *no* impact on the ability of a claimant to receive TTD.

The 05/01/2008 independent medical review of K.L. Schoenham, D.C., upon which the employer relies, indicates that temporary total compensation should not be paid as the Injured Worker is capable of resuming light-duty work. *This is not the standard for the assessment of the propriety of the payment of temporary total compensation.*

(Emphasis added). In sum, the Commission found that a) the earlier decision denying TTD did not prevent future TTD awards because voluntary abandonment was inapplicable; b) the additional allowance and increased restrictions constituted new and changed circumstances that allowed for a new TTD award; and c) TTD was appropriate for Mr. Gullotta. (Supp. at p. 15-16). Despite this clear holding, APV appealed this decision to the Commission. Further appeal was refused. Not satisfied with the decision, Akron Paint instituted a mandamus action.

APV must establish an abuse of discretion to warrant mandamus in their favor. The Magistrate ignored this standard of review, however, and used his own novel legal theory in recommending that the Commission's decision be overturned. The Magistrate devoted extensive energy in finding that Mr. Gullotta 'abandoned' his light-duty job. (Magistrate Decision,

Appendix B at ¶¶30-34). Despite the Magistrate’s admission that voluntary abandonment did not apply here, the principles of voluntary abandonment clearly animated the Magistrate’s decision. (Id.) The Magistrate incoherently concluded that ‘new and changed circumstances’ did not apply because Mr. Gullotta abandoned his light-duty job.

However, even if there is medical evidence upon which the commission relied showing that claimant’s medical condition has worsened since his April 16, 2007 resignation, such evidence of a worsening medical condition cannot alter the previously determined fact that claimant has no job to return to as a direct result of his unjustified abandonment of his light duty job or his unjustified refusal to accept other light-duty work offered by his employer. Thus claimant has no lost wages during the period of claimed disability for which he can be compensated.

(Id.). The Magistrate cited no legal authority for this proposition.¹ Nor did he deal with the obvious inconsistency that voluntary abandonment was not applicable here. The Magistrate cited no law for its argument that TTD was inapplicable because the “claimant had no lost wages” and for good reason—that position has no legal basis and is incorrect as a matter of law.

Nonetheless, the Tenth District purportedly upheld the Magistrate’s findings while simultaneously providing a different theory for why mandamus was appropriate. (Tenth Dist. Op., Appendix A at p. 2, ¶ 4). The Tenth District found that the Commission as a matter of law could not find “new and changed circumstances” because there was no evidence that Mr. Gullotta was unable to perform light-duty work. (Id.) “Although the commission found that the worsening of claimant’s condition constituted ‘new and changed circumstance,’ there was no evidence that the claimant would have been prevented from performing the light duty work previously offered by relator.” (Id.) The Tenth District continued, “without such evidence, the

¹ In fact, the legal authority is clearly opposite. The Ohio Supreme Court held in *State ex rel. Ellis v. Super Valu, Inc. v. Indus. Comm.*, 115 Ohio St.3d 224, 2007-Ohio-4920, at ¶ 6, that a finding that an injured employee who refused a job offer, which is what Mr. Gullotta leaving the light duty job was, does not translate into voluntary abandonment. Id. They are mutually exclusive doctrines. Id.

commission did not properly invoke continuing jurisdiction over its prior final order.” (Id.) The Tenth District likewise provided no legal support for this proposition. The Tenth District apparently confused the doctrines of the defense of refusing a good faith job offer and continuing jurisdiction. Whether Mr. Gullotta refused a good faith job offer has nothing to do with whether the Commission has continuing jurisdiction pursuant to R.C. 4123.52. But the Tenth District distorted the defense to prevent continuing jurisdiction. In so doing, they altered long standing authority for when continuing jurisdiction can be found, in contrast to the Ohio Supreme Court’s mandates. *Bing*, 61 Ohio St.3d at 426.

The Tenth District also took the step of acting as the Commission and making evidentiary decisions. Specifically, the Court asserted that Dr. Ungar’s Jun 4, 2008 report *did not* demonstrate that Mr. Gullotta was unable to perform light duty work.

The claimant also argues that Dr. Ungar’s June 4, 2008 report is some evidence that the claimant’s worsened condition would have prevented him from performing the offered light duty work. Again, we disagree. The portion of Dr. Ungar’s report cited by claimant does not discuss the physical requirements of the of the light duty work offered by relator. Nor does Dr. Ungar clearly state that the claimant would not have been able to perform the light duty work offered by relator.

(Appendix A at ¶ 6). The Tenth District made this finding despite the obvious finding by Dr. Ungar that Dr. Gullotta could not perform light-duty work. (Supp. at p. 11).

Mr. Gullotta and the Industrial Commission therefore brought this appeal so that the correct legal precedent is applied so that Relator-Appellee’s mandamus request is denied.

LAW AND ARGUMENT

For a writ of mandamus to issue, the relator must demonstrate that: 1) the relator has a clear legal right to the relief requested; 2) the respondent is under a clear legal duty to provide the relief requested; and 3) the relator has no other plain and adequate remedy at law. *State ex*

rel. Stafford v. Industrial Com. of Ohio (1989), 47 Ohio St.3d 76, 77-78, 547 N.E.2d 1171. To establish the existence of a clear legal right, the relator must demonstrate that the Commission abused its discretion. *State ex rel. Hutton v. Industrial Commission* (1972), 29 Ohio St.2d 9, 14, 278 N.E.2d 34. The Commission exercises broad discretion in the performance of its duties, and its actions are presumed to be valid and performed in the exercise of good faith and sound judgment. The relator must therefore establish that the Commission had no evidentiary basis for its decision. *State ex rel. Humble v. Mark Concepts, Inc.* (1979), 60 Ohio St.2d 77, 79, 397 N.E.2d 403. So long as some evidence consists for the Commission's decision, mandamus is not appropriate. *State ex rel. Fiber-Lite Corp. v. Industrial Com. of Ohio* (1988), 36 Ohio St.3d 202, 204, 522 N.E.2d 548.

Courts must give due deference to an interpretation formulated by an administrative agency which has accumulated substantial expertise in executing the law and to which the legislature has delegated the responsibility of implementing the legislative command. *McLean*, 25 Ohio St.3d at 92. The Commission is exclusively responsible for evaluating evidentiary weight and credibility. *State ex rel. Teece v. Indus Comm.* (1981), 68 Ohio St.2d 165, 429 N.E. 433. Accord *State ex rel. David's Cemetery v. Indus. Comm.* (2001), 92 Ohio St.3d 498, 751 N.E.2d 1005 ("The Commission is the sole evaluator of evidentiary weight and credibility). As long as there is evidence supporting the Commission's order, the order will be upheld. *State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18, 21, 508 N.E.2d 936.

I. THE COMMISSION CORRECTLY FOUND THAT MR. GULLOTTA'S INITIAL TTD BENEFITS WERE BARRED BY THE DEFENSE OF REFUSAL TO ACCEPT A GOOD FAITH JOB OFFER AND NOT VOLUNTARY ABANDONMENT, PERMITTING FUTURE TTD BENEFITS

The Industrial Commission correctly found that Mr. Gullotta refused a good faith job offer but that voluntary abandonment was not applicable because Mr. Gullotta could not return to his former position of employment. State ex rel. Ellis v. Super Valu, Inc. v. Indus. Comm., 115 Ohio St.3d 224, 2007-Ohio-4920, at ¶ 6.

A. The Industrial Commission's Initial Termination of Mr. Gullotta's TTD Was Proper

TTD can be terminated when an injured worker refuses a good faith job offer. R.C. 4123.56(A); O.A.C. § 4123-3-32(B)(2)(d). The refusal of suitable alternate employment is a defense to TTD. *State ex rel. Ellis v. Super Valu, Inc. v. Indus. Comm.*, 115 Ohio St.3d 224, 2007-Ohio-4920, at ¶ 6. Suitable employment must be work within the employee's physical capabilities, O.A.C. § 4121-3-32(A)(3), and the offer must take into account all allowed conditions. O.A.C. § 4121-3-32(B)(1)(b). See *State ex rel. Ganu v. Willow Brook Christian Cmty.*, 108 Ohio St.3d 296, 2006-Ohio-907 (a job offer must be supported by a consideration of all allowed conditions).

Here, the Commission properly determined that Mr. Gullotta refused a good faith job offer at the time of its November 29, 2007 decision. (Supp. at p. 5). At the time, Mr. Gullotta's claim was allowed only for "sprain lumbar region." (Id.) Mr. Gullotta was provided a light duty job within Dr. Lohr's restrictions for that allowance. (Id.) Mr. Gullotta's refusal to continue to perform his light duty position with APV is the equivalent of refusing a light duty offer. O.A.C. § 4123-3-32(B)(2)(d).

B. The Commission Properly Found That Mr. Gullotta Did Not Voluntarily Abandon His Former Position of Employment

Under the voluntary abandonment doctrine, if an injured worker has voluntarily abandoned his or her former position of employment, then they are precluded from receiving TTD until they re-enter the workforce. *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St.3d 42, 517

N.E.2d 533. But voluntary abandonment *only* applies to preclude TTD benefits where an injured worker abandoned his former position of employment. *State ex rel. OmniSource Corp. v. Indus. Comm.* (2007), 113 Ohio St.3d 303. It *does not* apply when one leaves a position that is not their former position of employment. *Id.* A finding that a claimant has unjustifiably refused a good faith job offer “does not translate into a voluntary abandonment.” *State ex rel. Ellis v. Super Valu, Inc. v. Indus. Comm.*, 115 Ohio St.3d 224, 2007-Ohio-4920. Instead, those doctrines are mutually exclusive. *Id.* With voluntary abandonment, the claimant’s ability to return to the former position is never in dispute, what is at issue is the reason for that inability. *Id.* at ¶8. With the defense of refusal of suitable alternate employment, by contrast, there is no question that the injured worker can return to her former position because that is inherent with the restricted duty job offer. *Id.* at ¶9. “In such a case, a finding of voluntary abandonment could not be sustained, since a claimant cannot voluntarily abandon a position that he or she is medically incapable of performing.” *Id.* at ¶12.

Here, the Commission correctly found that voluntary abandonment was not applicable because Mr. Gullotta could not return to his former position of employment. (Supp. at p. 5). Instead, the proper issue was whether Mr. Gullotta refused a good faith job offer. (*Id.*) Importantly, Relator-Appellee did not challenge the finding that voluntary abandonment was not applicable, making this determination *res judicata*. In later granting Mr. Gullotta TTD, the Commission again found voluntary abandonment inapplicable.

Unfortunately, the Magistrate claimed he was not applying the voluntary abandonment doctrine but simultaneously used the doctrine in everything but name only to later deny Mr. Gullotta TTD. (Magistrate Op., Appendix B). The Magistrate spent several paragraphs discussing how “claimant, without legal justification, *abandoned* his light-duty job.” (*Id.* at

¶33). The Magistrate subsequently determined that TTD was inappropriate because of Mr. Gullotta's "unjustified abandonment of his light-duty job." (Id. at ¶47). The Magistrate is clearly attempting to apply the voluntary abandonment doctrine to bar Mr. Gullotta from receiving future TTD benefits. But voluntary abandonment is inapplicable here by *res judicata*, and is clearly inapplicable as a matter of law. *Super Valu*, 2007-Ohio-4920, at ¶ 12. Instead, the Commission correctly decided that the voluntary abandonment doctrine was inapplicable. (Supp. at p. 15).

II. THE INDUSTRIAL COMMISSION CORRECTLY FOUND NEW AND CHANGED CIRCUMSTANCES

The Commission properly found new and changed circumstances existed because Mr. Gullotta had a change in his condition, namely an additional allowance and increased restrictions.

Once the Commission correctly concluded that voluntary abandonment was not applicable, it could consider whether Mr. Gullotta again warranted TTD benefits. To grant such benefits, the SHO had to first determine whether it had continuing jurisdiction to consider Mr. Gullotta's new TTD application. R.C. 4123.52 provides that

The jurisdiction of the industrial commission over each case shall be continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified.

This provision exists because the General Assembly recognized that an employee may find they are temporarily unable to work more than once in their lifetime. *Bing*, 61 Ohio St.3d at 426. R.C. 4123.52 vests the Commission with continuing jurisdiction to revisit a case and make later TTD awards. Id. This applies even in cases where TTD benefits had previously been terminated. Id.

The Commission's continuing jurisdiction can be invoked for new and changed circumstances. *State ex rel. Board of Ed. V. Johnston* (1979), 58 Ohio St. 2d 132, 388 N.E.2d 1383. If a claimant's physical condition that existed at the time of the order changes, the Commission has continuing jurisdiction to consider and act upon that changed condition. *State ex rel. Rohr v. Indus. Comm.*, 126 Ohio St.3d 259, 933 N.E.2d 254, 2010-Ohio-3756, ¶ 15; *State ex rel. Weinberger v. Indus. Comm.* (1941), 139 Ohio St. 92, 38 N.E.2d 399. Accord *State ex rel. Keith v. Indus. Comm.* (1991), 62 Ohio St.3d 139, 142, 580 N.E.2d 433 (new and changed circumstances exist when the injured worker's condition has changed subsequent to the initial award). This includes the situation where an injured worker previously had TTD terminated, but has a change in their condition that again renders the claimant TTD. *Bing*, 61 Ohio St.3d at 426. The Commission is entrusted with making a factual determination regarding whether TTD again exists to warrant continuing jurisdiction. *Id.*

Here, the Commission correctly found that new and changed circumstances existed based upon Mr. Gullotta's additional allowance for "substantial aggravation of hypertrophy of the L4 and L5 facet joints on 3/24/2008." (Supp. at p. 7). Mr. Gullotta's worsened condition was further evidenced by his increased work restrictions. On September 10, 2007, Dr. Ungar increased the said work restrictions, opining that claimant could never carry more than ten pounds." (Supp. at p. 9). Dr. Ungar further indicated Mr. Gullotta was temporary and totally disabled from work. (*Id.*) Then, in his June 4, 2008 report, Dr. Ungar stated "It clearly indicates from my records that he was unable to return to that employment.... *or any form* of light duty modification. (Supp. at p. 11). "He was doing light duty . . . and the light duty has proven to cause continued aggravation of his symptomatology on a daily basis." (*Id.*) The SHO further relied upon the treatment notes of Dr. Neuendorf which documented an increase in

treatment, as Mr. Gullotta was receiving facet blocks as a result of the allowed conditions. (Supp. at p. 16). The additional allowance and increased work restrictions clearly constitutes a change in Mr. Gullotta's physical condition. *Weinberger*, 139 Ohio St. 92. The Commission is exclusively responsible for weighing the evidence and determining that new and changed circumstances exist. *Rohr*, 2010-Ohio-3756, ¶ 16.

This analysis by the Commission was correct and entitled to deference. But the Tenth District apparently became confused by the concept of continuing jurisdiction and the defense of a refusal of a good faith job offer, and conflated them to create a novel theory that Mr. Gullotta must demonstrate that he or she is unable to return to a light-duty position to demonstrate "new and changed circumstances." (Tenth Dist. Op., Appendix A at ¶ 4). The Tenth District cited no legal support for this new rule—and would not have been able to—because none exists. This Court has held that it will not make it more difficult for claimants to qualify for temporary total benefits, but that is precisely what the Tenth District did in creating a new rule that imposes a barrier upon receiving subsequent benefits. *Bing*, 61 Ohio St.3d at 426. The Tenth District's position is simply inconsistent with long standing law, which is that "new and changed circumstances" can be invoked when the Injured Worker's condition has changed subsequent to the initial decision. *Keith*, 62 Ohio St.3d at 142. The Commission can invoke continuing jurisdiction when it finds that the injured worker's condition has degraded and TTD is appropriate. See *Bing*, 61 Ohio St.3d at 426 (a "flare-up" of an existing injury is sufficient to invoke continuing jurisdiction.)² In following *Bing*, the Commission had sufficient evidence here to find new and changed circumstances. *Id.*

² Worse, even if the Tenth District's new rule was adopted, they ignored clear evidence that Mr. Gullotta *could not* return to light duty work, thereby misapplying their own rule. Dr. Unver first observed that Mr. Gullotta was unable

Nor did the Tenth District provide deference to the Commission's legal and factual findings. The Commission has long interpreted R.C. 4123.52 to grant continuing jurisdiction when a claimant's condition has worsened subsequent to a previous decision—a position entitled to deference. And the Commission's determination that new and changed circumstances existed in the form of Mr. Gullotta being TTD because of his additional condition and increased work restrictions was entitled to deference. *Bing*, 61 Ohio St.3d at 426. Despite this, the Tenth District inserted itself as a 'Super Commission' and made its own determinations regarding new and changed circumstances without any reference to the Commission's decision, going so far as to assert that Dr. Ungar did not find that Mr. Gullotta was unable to perform light-duty work, (Tenth Dist. Op., Appendix A, at ¶ 6), when Dr. Ungar's plainly wrote that Mr. Gullotta was unable to perform "any light duty modification." (Supp. at p. 11).³

The Tenth District clearly misunderstood the applicable law and decided to take an activist posture and create new law without deference to the Commission's findings. But the law is straightforward—the Commission may find continuing jurisdiction where the injured worker's condition has changed subsequent to the previous decision. *Bing*, 61 Ohio St.3d at 426. The Commission correctly found new circumstances here, namely that Mr. Gullotta's claim was

to return to work in his September 11, 2007 report. (Supp. at p. 9). He re-iterated this point in his June 4, 2008 report, stating that Mr. Gullotta was unable to return to "*any form of light duty modification.*" (Supp. at p. 11).

³ The Tenth District somehow found that "the portion of Dr. Ungar's report cited by claimant does not discuss the physical requirements of the light duty work offered by relator. Nor does Dr. Ungar clearly state that the claimant would not have been able to perform the light duty work offered by relator." (Tenth Dist. Op., Appendix A, at ¶ 6). It is unclear how that is consistent with Dr. Ungar's report, which plainly states that Mr. Gullotta is "unable to return to *that employment* [referring to the light duty job he was in for Relator-Appellee] or any form of light duty modification. He was doing light duty at that time and the light duty has proven to cause continued aggravation of his symptomatology on a daily basis." (Supp. at p.11). This clearly demonstrates a usurping of the Commission's role and an activist posture by the Tenth District.

allowed for an additional condition and he now had increased work restrictions. See *id.* (a “flare-up” of an existing injury is sufficient to invoke continuing jurisdiction.”).

III. THE COMMISSION CORRECTLY FOUND THAT TTD WAS APPROPRIATE

Once the Commission properly determined that new and changed circumstances existed, it properly found that Mr. Gullotta was again TTD based upon the additional allowance and increased restrictions. The Relator-Appellee failed to make a good faith job offer based upon the allowed conditions, negating this defense.

A. Temporary Total Disability Was Properly Granted

R.C. 4123.56(A) provides that in the case of temporary disability, an employee shall receive compensation so long as the disability is total. TTD is a disability that prevents a worker from returning to his former position of employment. *State ex rel. Nelson McCoy Pottery Co. v. Wilson* (1990), 56 Ohio St.3d 28, 564 N.E.2d 91. In considering TTD, it is only necessary to consider the job for which the claimant was employed. *State ex rel. Consolidation Coal Co. v. Indus. Comm.* (1979), 58 Ohio St.2d 127, 388 N.E.2d 1382. If the injured worker cannot return to her or his former position, then TTD is appropriate. *Id.*

An injured worker can receive temporary total disability even if they previously had TTD terminated where she or he has once again become temporarily totally disabled. *State ex rel. Bing v. Indus. Comm.* (1991), 61 Ohio St.3d 424. The Injured Worker must only establish that they are once again TTD. *Id.* This Court has been unwilling to read language into R.C. 4123.56(A) that makes it more difficult for claimants to qualify for TTD because R.C. 4123.95 mandates that workers’ compensation statutes be liberally construed in favor of employees. *Id.*

Here, once the Commission determined that R.C. 4123.52 applied, it correctly determined that TTD was appropriate for Mr. Gullotta. As the Commission noted, no evidence exists “which indicates [Mr. Gullotta] is capable of returning to his former position of employment in

the shipping department of the named employer.” (Supp. at p. 15). As temporary total disability is determined in regards to one’s former employment position, Mr. Gullotta was found TTD. *Consolidation Coal Co*, 58 Ohio St.2d 127. Whether Mr. Gullotta could return to light duty work is irrelevant for determining TTD. (Supp. at p. 15). The Commission found this position supported by Mr. Gullotta’s additional allowance and Dr. Ungar’s reports. (Id.) In particular, Dr. Ungar found that Mr. Gullotta was unable to return to the light duty position he had left from APV or any light duty work. (Supp. at p. 11). The Commission is the exclusive evaluator of evidence and has some support for its determination.

B. The Defense of Refusal Suitable Employment is Inapplicable Because APV Did Not Offer Mr. Gullotta a Position Consistent With All of His Allowances

As noted, the defense of “refusal of suitable alternative employment” necessitates that the employer take all allowed conditions into account. O.A.C. § 4121-3-32(B)(1)(b). Whether an offer constitutes a good faith offer of employment is a factual determination for the Commission. *Super Valu*, 2007-Ohio-4920, ¶13.

Here, APV did not make a good faith job offer that took into account Mr. Gullotta’s additionally allowed conditions. That is, APV provided Mr. Gullotta with a suitable light-duty job for his restrictions when he only had the allowed condition of “sprain lumbar region.” (Supp. at p. 5). Mr. Gullotta did not accept that offer, resulting in the termination of Mr. Gullotta’s TTD. (Id.) Subsequent to this decision, however, Mr. Gullotta’s claim was additionally allowed for “substantial aggravation of pre-existing hypertrophy at the L4 and L5 facet joints.” (Supp. at p. 7). Mr. Gullotta had increased workplace restrictions placed upon him by his physicians. (Supp. at p. 11). APV thus needed to make a new good faith offer that took into account these new work restrictions caused by the new condition. Mr. Gullotta previous light duty position was

sufficient for a claim only allowed for a lumbar sprain—not for the increased restrictions. APV made no such offer. The SHO correctly found this doctrine not applicable, finding that it is irrelevant whether Mr. Gullotta could resume the same light-duty position. (Supp. at p. 15). The defense of a suitable employment position was not applicable.

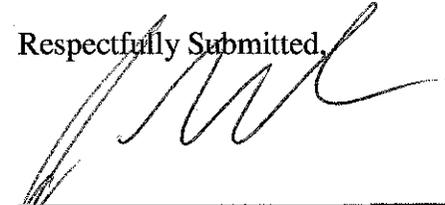
To the extent the Tenth District and Magistrate attempted to assert this doctrine prevented Mr. Gullotta from subsequently receiving TTD, they were incorrect for the reason cited above.⁴ Mr. Gullotta allowed conditions had vastly changed since the earlier light-duty job offer, making that offer no longer applicable for Mr. Gullotta's conditions. O.A.C. § 4121-3-32(B)(1)(b). Whether this doctrine applies is explicitly a determination for the Commission. *Super Valu*, 2007-Ohio-4920, ¶13. The Commission did not find it applicable. (Supp. at p. 15-16). The Tenth District and Magistrate gave *no deference* to the Commission on this issue, instead finding “there was no evidence that the claimant would have been prevented from performing the light duty work previously offered by relator.” (Tenth Dist. Op., Appendix A, at ¶4). First, this is the Commission's decision to make, not the Tenth District's. Second, the Tenth District did not apply the proper standard—the light duty job Mr. Gullotta had previously been offered was no longer applicable because Mr. Gullotta had newly allowed conditions and work restrictions based on that allowance, making that job offer null-in-void. In sum, the Tenth District incorrectly applied the law and provided no deference to the Commission's findings. The Commission correctly found that APV had not made a new good faith job offer based on Mr. Gullotta's new work restrictions, rendering the doctrine inapplicable.

⁴ The Tenth District and Magistrate conflate several different doctrines together, so it is often difficult to conclude what, precisely was the Appeals' Court justification for granting mandamus.

CONCLUSION

For the foregoing reasons, the Tenth District failed to follow its role in mandamus. It is clear that the Commission had some evidence for its decision, rendering mandamus inappropriate. The Tenth District's decision should be reversed and Relator-Appellant's mandamus request should be denied.

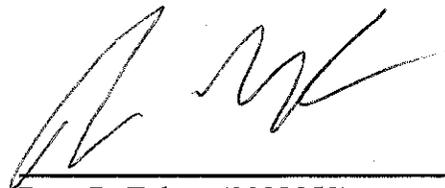
Respectfully Submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the Merit Brief of Appellant-Respondent Giuseppe Gullotta was served to Richard L. Williger, Attorney at Law, 2070 East Avenue, Akron, OH 44314, and Gerald H. Waterman, Assistant Attorney General, Workers' Compensation Section, 150 E. Gay Street, 22nd Floor, Columbus, OH 43215, by regular U.S. mail service, postage prepaid, on this 15th day of November, 2010.



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COUNSEL FOR APPELLANT-
RESPONDENT, GIUSEPPE GULLOTTA

APPENDIX

- A. JUDGMENT ENTRY AND DECISION RENDERED ON MARCH 30, 2010**
- B. MAGISTRATE'S DECISION RENDERED ON NOVEMBER 25, 2009**

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel.
Akron Paint & Varnish, Inc.,

Relator,

v.

Guisepe Gullotta and
Industrial Commission of Ohio,

Respondents.

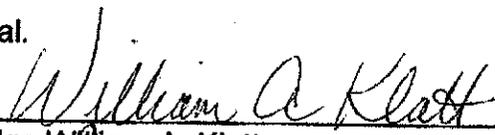
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(REGULAR CALENDAR)

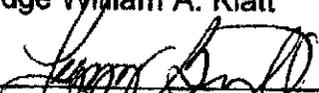
JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on March 30, 2010, we adopt the findings of fact and conclusions of law contained in the magistrate's decision. As a result, we issue a writ of mandamus ordering the commission to vacate its staff hearing officer's order of July 16, 2008, and to enter an order that denies the request for temporary total disability compensation presented by Dr. Ungar's C-84 prepared April 14, 2008 and filed April 23, 2008. Costs assessed against respondents.

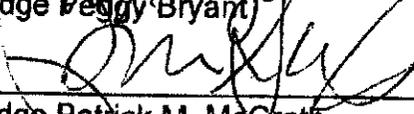
Within three (3) days from the filing hereof, the clerk of this court is hereby ordered to serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.



Judge William A. Klatt



Judge Peggy Bryant



Judge Patrick M. McGrath

APPENDIX A

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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State of Ohio ex rel.
Akron Paint & Varnish, Inc.,

Relator,

No. 09AP-492

v.

(REGULAR CALENDAR)

Giuseppe Gullotta and
Industrial Commission of Ohio,

Respondents.

D E C I S I O N

Rendered on March 30, 2010

Richard L. Williger Co., L.P.A., and Richard L. Williger, for relator.

Philip J. Fulton Law Office, William A. Thorman, III, and Michael P. Dusseau, for respondent Giuseppe Gullotta.

Richard Cordray, Attorney General, and Eric Tarbox, for respondent Industrial Commission of Ohio.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶1} Relator, Akron Paint & Varnish, Inc., commenced this original action in mandamus seeking an order compelling respondent, Industrial Commission of Ohio ("commission"), to vacate its order that awarded respondent, Giuseppe Gullotta ("claimant"), temporary total disability ("TTD") compensation beginning November 5, 2007, and to enter an order denying said compensation.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that the commission abused its discretion when it awarded claimant TTD compensation because it failed to properly exercise continuing jurisdiction. The magistrate determined that the commission's earlier order denying the claimant TTD compensation was final, and therefore, the order bound the commission in subsequent administrative proceedings unless the commission properly invoked its R.C. 2143.52 continuing jurisdiction. Because the commission did not properly invoke its continuing jurisdiction, the magistrate has recommended that we grant relator's request for a writ of mandamus.

{¶3} The commission filed an objection to the magistrate's decision arguing that it properly exercised continuing jurisdiction because there were "new and changed circumstances" that warranted the payment of TTD. Therefore, the commission argues that it was not bound by its earlier order that denied claimant TTD compensation. We disagree.

{¶4} The claimant's refusal to perform light duty work within his physical restrictions offered by relator was the basis for the commission's prior order denying TTD. Although the commission found that the worsening of claimant's condition constituted "new and changed circumstances," there was no evidence that the claimant would have been prevented from performing the light duty work previously offered by relator. Without such evidence, the commission did not properly invoke continuing jurisdiction over its prior final order. Simply stated, the new and changed circumstances

noted by the commission did not undermine the basis for the commission's prior order. Therefore, there was no evidence upon which the commission could exercise continuing jurisdiction. Accordingly, the commission is bound by its prior order that denied claimant TTD compensation because the claimant refused light duty work within his physical restrictions offered by relator. We overrule the commission's objection.

{¶5} The claimant also filed objections to the magistrate's decision. The claimant first argues that there was evidence that his worsened condition would have prevented him from performing the offered light duty work. Specifically, the claimant points to an increase in treatment and restrictions as evidence supporting the commission's exercise of continuing jurisdiction. However, as relator points out, an increase in treatment and restrictions are not sufficient to demonstrate that the claimant could not have performed the offered light duty work without some reference to the requirements of that work.

{¶6} The claimant also argues that Dr. Unger's June 4, 2008 report is some evidence that the claimant's worsened condition would have prevented him from performing the offered light duty work. Again, we disagree. The portion of Dr. Unger's report cited by claimant does not discuss the physical requirements of the light duty work offered by relator. Nor does Dr. Unger clearly state that the claimant would not have been able to perform the light duty work offered by relator. Therefore, we overrule claimant's first objection.

{¶7} In his second objection, the claimant argues that the magistrate erred by applying the doctrine of voluntary abandonment in his analysis. However, the claimant misunderstands the basis for the magistrate's decision.

{¶8} The magistrate discussed the doctrine of voluntary abandonment in his decision, but only to explain why the commission properly refused to apply the doctrine to claimant's claim. Contrary to the claimant's contention, the magistrate did not find that the claimant had to re-enter the work force to re-establish entitlement to TTD. Nor did the magistrate apply any other principle associated with the doctrine of voluntary abandonment. Rather, the magistrate found that there was no evidence to establish new and changed circumstances that would justify the commission's exercise of continuing jurisdiction given the commission's prior order denying claimant TTD based upon his refusal to perform light duty work within his physical restrictions. Therefore, we overrule claimant's second objection.

{¶9} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we adopt the magistrate's decision as our own, including the findings of facts and conclusions of law contained therein. In accordance with the magistrate's decision, we grant relator's request for a writ of mandamus ordering the commission to vacate its staff hearing officer's order of July 16, 2008, and to enter an order that denies the request for TTD compensation presented by Dr. Ungar's C-84 prepared April 14, 2008 and filed April 23, 2008.

*Objections overruled;
writ of mandamus granted.*

BRYANT and McGRATH, JJ., concur.

APPENDIX
IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ex rel.
Akron Paint & Varnish, Inc.,

Relator,

v.

Giuseppe Gullotta and Industrial
Commission of Ohio,

Respondents.

No. 09AP-492

(REGULAR CALENDAR)

MAGISTRATE'S DECISION

Rendered on November 25, 2009

Richard L. Williger Co., L.P.A., and Richard L. Williger, for relator.

Philip J. Fulton Law Office, William A. Thorman, III, and Michael P. Dusseau, for respondent Giuseppe Gullotta.

Richard Cordray, Attorney General, and Eric Tarbox, for respondent Industrial Commission of Ohio.

IN MANDAMUS

{¶10} In this original action, relator, Akron Paint & Varnish, Inc. ("relator" or "APV"), requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding respondent Giuseppe Gullotta

("claimant") temporary total disability ("TTD") compensation beginning November 5, 2007, and to enter an order denying said compensation.

Findings of Fact:

{¶11} 1. On January 2, 2007, claimant injured his lower back while employed with relator, a state-fund employer. Initially, the industrial claim (No. 07-300245) was allowed for "sprain lumbar region."

{¶12} 2. Following a brief period of TTD compensation, claimant returned to work at APV at a light-duty position on February 23, 2007.

{¶13} 3. On April 11, 2007, attending physician Stephen A. Lohr, M.D., wrote: "He is not amenable to increasing his work restrictions. He said his work causes him a lot of pain. We will continue him on his current work restrictions and we will have him see a spine specialist."

{¶14} 4. On April 16, 2007, claimant met with APV Vice President Michael Summers, who thereafter memorialized the meeting in a letter to claimant dated April 18, 2007:

* * * You had expressed some concern for the new position we have established for you to meet the requirements of APV Production and to stay within the restrictions of your medical release[.] It was explained to you on Monday[.] April 16th[.] 2007[.] that you were being moved from your position in the Shipping and Receiving Department and moved to the Production Department to perform tasks within your physical limitations[.] * * *

* * *

You expressed further concern that any one of these tasks for a long period of time would aggravate your condition and APV answered this concern with flexibility in completing the tasks[.] It was further explained that although these tasks needed to be completed each day, there was no particular

order that they needed to be completed and that you had the freedom to move between these tasks to remain in accordance with your medical release[.] It was also offered that you could be sent out for an independent evaluation and functional assessment to determine if the task that we proposed met the criteria of the release[.] You had refused the independent evaluation and expressed that you just wanted to be left in shipping[.] When it was made clear that this was no longer an option you stated that you were tired of this situation and gave a verbal resignation, "I quit" and left the premises[.] APV accepted your resignation and accompanied you to gather your belongings and escorted you off the premises as is our policy in voluntary quit situations[.]

{¶15} 5. On August 1, 2007, claimant submitted two C-84s completed by Daniel Mazanec, M.D. The C-84s requested TTD compensation for the period from April 24 through November 4, 2007.

{¶16} 6. Following a September 18, 2007 hearing, a district hearing officer ("DHO") issued an order denying the request for TTD compensation.

{¶17} 7. Claimant administratively appealed the DHO's order of September 18, 2007.

{¶18} 8. Following a November 29, 2007 hearing, a staff hearing officer ("SHO") issued an order that vacates the DHO's order but, nevertheless, denies the request for TTD compensation for the period April 24 through November 4, 2007. The SHO's order of November 29, 2007 explains:

The Claimant was employed in the shipping department at the employer's place of business on the date of injury. Following his injury on 01/02/2007, the Claimant was paid temporary total disability compensation through 02/22/2007. Thereafter, the Claimant returned to work at light duty based on restrictions provided by his physician of record, Dr. Lohr. The 02/22/2007 Medco-14 report of Dr. Lohr released the Claimant to return to work at light duty as a courier for

paperwork between departments, with the further restriction of no lifting, stooping, or repetitive motions.

On 03/14/2007[,] Dr. Lohr issued a new Medco-14 report which increased the Claimant's physical capabilities. This report allowed the Claimant to carry up to ten pounds frequently, eleven to twenty pounds occasionally, and allowed for occasional bending, twisting/turning, reaching below the knee, pushing/pulling, and squatting/kneeling. The Claimant was not restricted on his ability to stand, walk, or sit. Based upon these new restrictions from Dr. Lohr, the employer began to increase the job duties assigned to the Claimant. The Claimant testified that these job duties involved labeling containers of paint or varnish and operating an automatic wrapping machine.

The Claimant testified that these increased job duties caused increased low back pain, and he felt that the new job duties were not within the restrictions outlined by Dr. Lohr.

The Claimant saw Dr. Lohr on 04/11/2007. Dr. Lohr's office note from that date does indicate that the Claimant complained of increasing back pain which the Claimant attributed to his work duties. However, after an examination of the Claimant, Dr. Lohr returned the Claimant to work with the same restrictions that had been in place since 03/14/2007. Dr. Lohr did not indicate that the Claimant could not perform the job duties to which he had been assigned by the employer.

The Claimant apparently complained to the employer regarding his job duties while on light duty. As a result, Mr. Summers met with the Claimant on 04/16/2007. The results of this meeting are outlined in a letter from Mr. Summers to the Claimant dated 04/18/2007. At the meeting on 04/16/2007 the employer offered different light duty work to the Claimant, including placing empty pails into an automatic labeling machine, labeling small package items such as four ounce cans, quarts, and dot markers, and running an automatic sweeper machine similar to a fork truck. The employer attempted to address the Claimant's concerns regarding these particular tasks by informing him that the tasks did not need to be completed in a particular order and that he had freedom to move between those tasks at his discretion. When the Claimant expressed his desire to return to the shipping department, he was informed that this was

not possible due to the restrictions placed by Dr. Lohr. As a result, the Claimant verbally informed Mr. Summers that he was quitting and left the premises.

It is clear that the Claimant was unable to return to work at his former position of employment at the time of his resignation on 04/16/2007. Therefore, the Claimant's resignation cannot be considered a voluntary abandonment of employment that would bar the receipt of temporary total compensation thereafter. State ex rel. OmniSource Corp. v. Indus. Comm. (2007), 113 Ohio St. 3d 303. In addition, the Claimant's refusal of a light duty job offer does not equate to a voluntary abandonment of employment. State ex rel. Ellis Super Valu, Inc. v. Indus. Comm. (2007), 115 Ohio St. 3d 224.

However, the employer did provide the Claimant with a light duty job within the restrictions placed by Dr. Lohr prior to the Claimant's decision to resign his employment. The Claimant did work successfully in that position despite his complaints of increasing low back pain. Further, the employer sought to accommodate the Claimant's complaints by assigning him new job duties of a lighter nature. Instead of accepting or even attempting to perform these new job duties, the Claimant chose to resign his employment on 04/16/2007. Although the Claimant asserts that he was physically unable to do the job duties assigned by the employer and that these duties were outside the restrictions imposed by Dr. Lohr, the Claimant has presented no medical evidence from Dr. Lohr in support of this assertion. To the contrary, the 04/11/2007 office note and Medco-14 report of Dr. Lohr clearly indicate that the Claimant was advised to continue working in his light duty position with the same restrictions imposed previously. There is no indication that Dr. Lohr was of the opinion that the Claimant was medically incapable of performing the light duty position created by the employer or that Dr. Lohr advised the Claimant that he could not medically continue to perform his light duty job.

The Hearing Officer concludes that the period of disability beginning 04/24/2007 is not causally related to the industrial injury in this claim, but rather is due to the Claimant's refusal to return to his light duty job, his refusal of the modified light duty work offered on 04/16/2007, and his unilateral decision to resign from employment on 04/16/2007.

Therefore, it is the order of the Staff Hearing Officer that temporary total compensation is denied from 04/24/2007 through 11/04/2007.

This order is based on the 02/16/2007, 03/14/2007, and 04/11/2007 office notes of Dr. Lohr; the 02/22/2007, 03/14/2007, and 04/11/2007 Medco-14 reports of Dr. Lohr; the 04/18/2007 letter from Mr. Summers; and the testimony of Mr. Summers regarding the Claimant's job duties while on light duty and his resignation from employment.

{¶19} 9. On January 5, 2008, another SHO mailed an order refusing claimant's administrative appeal from the SHO's order November 29, 2007.

{¶20} 10. Earlier, on October 4, 2007, treating chiropractor Brent A. Ungar, D.C., wrote:

*** I believe that Mr. Glufepa [sic] Gullotta is still suffering from a chronic lumbar sprain/strain. However, I believe that this condition has not resolved and the pain was persistent due to the fact that he had an aggravation of a preexisting underlying condition of hypertrophy to the L4 and L5 facet which was aggravated from this injury. This facet hypertrophy was a preexisting condition and showed up on the MRI that was dated 1/4/07. I believe that his underlying chronic pain that he is still suffering post ten months from the injury is a direct causal relation to the injury and it greatly aggravated his preexisting facet hypertrophy as it was directly a result of the injury he sustained on 1/2/07. ***

{¶21} 11. On November 20, 2007, claimant moved for the allowance of an additional condition in the claim.

{¶22} 12. Following a March 24, 2008 hearing, a DHO additionally allowed the claim for "substantial aggravation of pre-existing hypertrophy at the L4 and L5 facet joints." The DHO's order states reliance upon Dr. Ungar's October 4, 2007 report and the January 4, 2007 MRI.

{¶23} 13. Apparently, the DHO's order of March 24, 2008 was not administratively appealed.

{¶24} 14. On April 14, 2008, Dr. Ungar completed a C-84 certifying TTD from September 10, 2007 to an estimated return-to-work date of May 16, 2008. The C-84 was filed on April 23, 2008.

{¶25} 15. Following a May 27, 2008 hearing, a DHO issued an order denying TTD compensation from November 5, 2007 through May 16, 2008.

{¶26} 16. Claimant administratively appealed the DHO's order of May 27, 2008.

{¶27} 17. Following a July 16, 2008 hearing, an SHO issued an order that vacates the DHO's order of May 27, 2008 and awards TTD compensation from November 5, 2007 through May 16, 2008 and to continue upon submission of medical proof. The SHO's order of July 16, 2008 explains:

* * * [T]he C-84 filed 04/23/2008 is granted to the extent of this order.

By way of history[,] the Staff Hearing Officer notes the Injured Worker was temporarily and totally disabled following the injury in this claim through 02/22/2007. The Injured Worker returned to work for the named employer in a light-duty capacity from 02/23/2007 through 04/23/2007. By Staff Hearing Officer order dated 11/29/2007[,] temporary total compensation was denied for the closed period 04/24/2007 through 11/04/2007 as the Injured Worker was found to have quit a light-duty job with the named employer which was within the restrictions provided by his physicians. Pursuant to the holding in State ex rel. OmniSource Corp. v. Industrial Commission (2007), 113 Ohio St. 3d 303, the Staff Hearing Officer expressly found the Injured Worker's resignation from employment on 04/23/2007 [sic] did not amount to a voluntary abandonment of employment as the Injured Worker was unable to return to his former position of employment on the date he resigned.

Subsequent to this determination, this claim was additionally recognized for substantial aggravation of hypertrophy of the L4 and L5 facet joints on 03/24/2008. The Staff Hearing Officer finds this is evidence of a worsening of the Injured Worker's condition and is evidence of new and changed circumstances which warrant the payment of temporary total compensation. Therefore, temporary total compensation is ordered paid from 11/05/2007 through 05/16/2008 and to continue upon the submission of medical proof.

This decision is based on the treatment records, narrative reports dated 10/04/2007 and 06/04/2008, and C-84 report dated 04/14/2008 from B.A. Ungar, D.C., and on the treatment records from Dr. Neuendorf which reflect the Injured Worker is presently receiving facet blocks for the newly recognized conditions. The Staff Hearing Officer notes the Medco-14 dated 09/10/2007 from B.A. Ungar, D.C., listed the Injured Worker's work-related capabilities which were more restrictive than those issued by Dr. Lohr and Dr. Mazanec which were the focus of the prior temporary total disability determination. Further, the newly imposed restrictions from Chiropractor Ungar on the 04/14/2008 C-84 report include the newly recognized condition of substantial aggravation of hypertrophy of the L4 and L5 facet joints. Lastly, the Staff Hearing Officer notes that the file presently contains no medical evidence which indicates the Injured Worker is capable of returning to work at his former position of employment in the shipping department of the named employer. The 05/01/2008 independent medical review of K.L. Schoenman, D.C., upon which the employer relies, indicates that temporary total compensation should not be paid as the Injured Worker is capable of resuming light-duty work. This is not the standard for the assessment of the propriety of the payment of temporary total compensation.

{¶28} 18. On August 7, 2008, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of July 16, 2008.

{¶29} 19. On May 19, 2009, relator, Akron Paint & Varnish, Inc., filed this mandamus action.

Conclusions of Law:

{¶30} The SHO's order of November 29, 2007 is a final commission order that, in denying TTD compensation, determined that claimant had, without justification, abandoned his light-duty job at APV and refused APV's offer of other light-duty work.

{¶31} The SHO's order of July 16, 2008 is a final commission order that awards claimant TTD compensation beginning November 5, 2007 notwithstanding the prior commission determination that claimant abandoned his light-duty job and refused an offer of other light-duty work without justification.

{¶32} The SHO's order of July 16, 2008 determined that medical evidence of a worsening of claimant's condition due to the additional claim allowance produced new and changed circumstances that permit an award of TTD compensation notwithstanding the prior commission determination that claimant abandoned his light-duty job and refused an offer of other light-duty work without justification.

{¶33} Accordingly, the main issue here is whether the commission abused its discretion by awarding TTD compensation following its prior final determination that, on April 16, 2007, claimant, without legal justification, abandoned his light-duty job and refused APV's offer of other light-duty work.

{¶34} Finding that the commission did abuse its discretion, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶35} R.C. 4123.56(A) provides for compensation in the event of temporary total disability:

* * * [P]ayment shall not be made for the period when any employee has returned to work, when an employee's treating physician has made a written statement that the employee is

capable of returning to the employee's former position of employment, *when work within the physical capabilities of the employee is made available by the employer or another employer*, or when the employee has reached the maximum medical improvement. * * * The termination of temporary total disability, whether by order or otherwise, does not preclude the commencement of temporary total disability at another point in time if the employee again becomes temporarily totally disabled.

(Emphasis added.)

{¶36} Supplementing the statute, Ohio Adm.Code 4121-3-32(A) provides:

(3) "Suitable employment" means work which is within the employee's physical capabilities.

* * *

(6) "Job offer" means a proposal, made in good faith, of suitable employment within a reasonable proximity of the injured worker's residence. * * *

Ohio Adm.Code 4121-3-32(B) provides:

(2) Except as provided in paragraph (B)(1) of this rule, temporary total disability compensation may be terminated after a hearing as follows:

* * *

(d) Upon the finding of a district hearing officer that the employee has received a written job offer of suitable employment.

{¶37} In his order of November 29, 2007, the SHO held that, because claimant was medically unable to return to his former position of employment at the time of his April 16, 2007 "resignation," such "resignation" cannot be found to be a voluntary abandonment of employment as that judicial doctrine has evolved by case law. The SHO's citation to *State ex rel. OmniSource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951, supports the SHO's holding.

{¶38} Rather, in his order of November 29, 2007, the SHO, in effect, determined that TTD compensation was statutorily barred under R.C. 4123.56(A)'s provision that TTD compensation shall not be paid "when work within the physical capabilities of the employee is made available by the employer." Clearly, under the statute, as supplemented by the administrative rule, TTD compensation is barred when the claimant refuses, without justification, to return to the light-duty job he has previously accepted.

{¶39} The SHO appropriately cited *State ex rel. Ellis Super Valu, Inc. v. Indus. Comm.*, 115 Ohio St.3d 224, 2007-Ohio-4920, wherein the court had occasion to distinguish the judicial doctrine of voluntary abandonment of employment with the R.C. 4123.56(A) statutory bar to compensation when work within the physical capabilities of the employee is made available by the employer.

{¶40} The *Ellis Super Valu* court explained the distinction:

* * * In a case of voluntary abandonment, the claimant's inability to return to the former position of employment is never in dispute. What is instead always at issue is the reason for that inability. Common to every voluntary-abandonment controversy is the existence of two independent reasons for the claimant's inability to return to the former position of employment. One is medical and one is not, with the two most common nonmedical reasons being an employment termination or a voluntary refusal to return. The issue in every voluntary-abandonment case is which cause was primary and which was secondary.

That is not the case with the defense of refusal of suitable alternate employment. This defense does not ask why the claimant has not returned to his former position of employment, because the answer is inherent in the mere fact of a job offer. There is no need to propose alternate employment if the claimant's inability to return to the former position is attributable to anything other than the injury.

Instead, the relevant inquiry in this situation is why the claimant has rejected an offer to ameliorate the amount of wages lost. This, in turn, can involve considerations of, for example, employment suitability, the legitimacy of the job offer, or whether the position was offered in good faith. The causal-relation question in this situation is different because it derives from a different compensatory intent, which is to facilitate the claimant's return to the work force. As critical as compensating injured workers and their dependents is, it is not the only goal addressed by the workers' compensations system. Assisting a claimant's return to gainful employment is also important, benefiting not only the employer and employee, but society at large.

* * *

* * * As a further incentive to return to the work force, R.C. 4123.56(A) was amended to provide that a claimant who was offered a job within his or her physical capacities could not receive temporary total disability compensation if he or she refused that job. 141 Ohio Laws, Part I, 766.

Given these distinct inquiries, a finding that a claimant has unjustifiably refused an offer of suitable alternate employment does not translate into a finding that the claimant voluntarily abandoned the former position of employment. In fact, they are mutually exclusive. An offer of alternate employment would occur only when a claimant is medically unable to return to the former position of employment. In such a case, a finding of voluntary abandonment could not be sustained, since a claimant cannot voluntarily abandon a position that he or she is medically incapable of performing. *State ex rel. OmniSource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951, 865 N.E.2d 41.

Id. at ¶8-12.

{¶41} In the November 29, 2007 SHO's order, the application of the statutory bar is explained as follows:

The Hearing Officer concludes that the period of disability beginning 04/24/2007 is not causally related to the industrial injury in this claim, but rather is due to the Claimant's refusal to return to his light duty job, his refusal of the modified light

duty work offered on 04/16/2007, and his unilateral decision to resign from employment on 04/16/2007.

{¶42} The commission's determination that claimant's request for TTD compensation is statutorily barred by the events of April 16, 2007 is contained in a final commission order that remains unchallenged in mandamus. Thus, that determination has a binding effect on subsequent administrative proceedings unless the commission were to appropriately exercise its R.C. 4123.52 continuing jurisdiction over the prior finding.

{¶43} Continuing jurisdiction is not unlimited. Its prerequisites are: (1) new and changed circumstances; (2) fraud; (3) clear mistake of fact; (4) clear mistake of law; and (5) error by an inferior tribunal. *State ex rel. Gobich v. Indus. Comm.*, 103 Ohio St.3d 585, 2004-Ohio-5990.

{¶44} Here, in the July 16, 2008 order, the SHO attempts to informally exercise continuing jurisdiction over the November 29, 2007 order and its finding that claimant unjustifiably abandoned his light-duty job and unjustifiably refused an offer of light-duty work. *State ex rel. Internatl. Truck and Engine Corp. v. Indus. Comm.*, 119 Ohio St.3d 402, 404, 2008-Ohio-4494, ¶16 (the case law renders an informal invocation of continuing jurisdiction impossible). The basis for this informal exercise of continuing jurisdiction is the prerequisite called "new and changed circumstances."

{¶45} While it is conceivable that the commission could appropriately exercise continuing jurisdiction over a prior determination that a claimant unjustifiably abandoned a light-duty job based upon the prerequisite of new and changed circumstances, it did not do so here. Claimant did not submit evidence of new and changed circumstances

that can justify elimination of the binding effect of the November 29, 2007 SHO's order and its statutory bar of compensation.

{¶46} In support of his claim to new and changed circumstances, claimant pointed to the additional claim allowance and to medical evidence showing that the medical condition had worsened subsequent to his April 16, 2007 resignation.

{¶47} However, even if there is medical evidence upon which the commission relied showing that claimant's medical condition has worsened since his April 16, 2007 resignation, such evidence of a worsening medical condition cannot alter the previously determined fact that claimant has no job to return to as a direct result of his unjustified abandonment of his light-duty job or his unjustified refusal to accept other light-duty work offered by his employer. Thus, claimant has lost no wages during the period of claimed disability for which he can be compensated.

{¶48} Based upon the above analysis, the magistrate concludes that the commission abused its discretion in determining that new and changed circumstances exist to permit an award of TTD compensation beginning November 5, 2007.

{¶49} Accordingly, for all the above reasons, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SHO's order of July 16, 2008, and to enter an order that denies the request for TTD compensation presented by Dr. Ungar's C-84 prepared April 14, 2008 and filed April 23, 2008.

13/ Kenneth W. Macke

KENNETH W. MACKE
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).

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